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U.S. DISTRICT COURT
DISTRICT OF UTAH

J. David Nelson (2385)
Bret W. Reich (9542)
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

INTERNATIONAL AUTOMATED
SYSTEMS, INC.

Plaintiff,

vs.

OPTIMAL ROBOTICS CORP., PSC, INC.,
SMITH'S FOOD & DRUG CENTERS,
INC. aka SMITH'S FOOD & DRUG
STORES, INC.; THE KROGER
COMPANY

Defendants.

Civil No.: 299 CV 517

Judge Paul G. Cassell
Magistrate Nuffer

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO AMEND
COMPLAINT**

Plaintiff by and through its attorney, J. David Nelson, submits the following memorandum
in support of Plaintiff's Motion to Amend Complaint.

I. Introduction and Statement of Facts

This action for patent infringement is before the Court on Plaintiff International

105

Automation Systems, Inc.'s Motion to Amend Complaint. Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party is allowed to amend the party's pleading by a leave of court or by written consent of the adverse party. The rule also states that "leave shall be freely given when justice so requires." Plaintiff has obtained the following information that shows the exercise of jurisdiction over Fred Meyer Stores, Inc. dba Fred Meyer ("Fred Meyer") by the Court is appropriate:

1. Fred Meyer has been registered to do business in the State of Utah since at least September 19, 1984 and maintains a registered agent by the name of Corporation Service Company located in Salt Lake City, Utah. **Ex. 1, *Utah Department of Commerce Business Registration.***

2. Fred Meyer is currently using and operating the infringing devices in Fred Meyer's stores in Salt Lake County. A visual inspection of these devices located at the Fred Meyer store located at 455 South 500 East, Salt Lake City, Utah confirms that the devices used by Fred Meyer's are the same infringing devices complained of in this action.. **Ex. 2, *Affidavit of Bret Reich.***

3. Fred Meyer owns and operates several retail stores in Salt Lake County, including but not limited to stores located in Salt Lake City (455 South 500 East, Salt Lake City, Utah); Granger (4091 W 3500 S, West Valley City, Utah); Holladay (3215 S. Valley, Salt Lake City, Utah); Sandy (825 E. 9400 S. Sandy, Utah); West Jordan (9000 S. Redwood Road, West Jordan, Utah).

4. Food 4 Less is using the infringing devices in California and Food 4 Less has stores located in Utah and is doing business in the State of Utah. *Ex. 2, Affidavit of Bret Reich*

II. Standard of Review

At this early stage of the litigation, Plaintiff must make only a prima facie case of personal jurisdiction. Doe v. National Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992). The allegations presented by Plaintiff must be taken as true to the extent they are uncontroverted by the defendant's affidavits. Rambo v. American Southern Ins. Co., 839 F.2d 1417 (10th Cir. 1988). All factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by defendant. *Id.* at 1417.

Personal jurisdiction can be broken down into either "general" or "specific" jurisdiction, and whether a court can assert either type of jurisdiction depends upon the subject matter of the claim asserted and the number and quality of contacts the non-resident defendant has with the forum. Harnishchfeger Engineers v. Uniflo Conveyor, 883 F. Supp. 608 (D. Utah 1995). The Utah long arm statute provides that it: "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." U.C.A. § 78-27-22. Accordingly, any set of circumstances that will satisfy due process will satisfy the long-arm statute. SII MegaDiamond, Inc. v. American Superabrasives Corp., 969 P.2d 430 (Utah 1998).

Consistent with due process, a court may exercise personal jurisdiction over a nonresident

defendant if minimum contacts exist between the defendant and the forum state such that maintenance of the lawsuit would not offend "traditional notions of fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (quotation omitted). The minimum contacts standard may be met in one of two ways: (1) a court may exercise general jurisdiction if the defendant's contacts with the forum state are continuous and systematic; or (2) a court may exercise specific jurisdiction over a defendant if it purposefully directs activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities. *See* Kuenzle v. HTM Sport-Und Freizeitgeräte AG, 102 F.3d 453, 455 (10th Cir. 1996).

III. Argument

A. Fred Meyer and Food 4 Less are Subject to the General Jurisdiction of the Court

The Utah Supreme Court has held that "general personal jurisdiction permits a court to exercise power over a defendant without regard to the subject of the claim asserted. Ho v. Jim's Enterprises Inc., 29 P.3d 633 (2001)(citing Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1122 (Utah 1992)). For general personal jurisdiction to exist, the defendant must be conducting substantial and continuous local activity in the forum State. Arguello, 838 P.2d at 1122. Utah courts are to consider several factors, none of which is alone the sine qua non to establish a business presence in the State. Hill v. Zale Corp., 482 P.2d 332, 334 (1971). The list of factors includes, but is not limited to, whether the non-resident defendant is:

1. licensed to do business in Utah;
 2. engaged in doing business in Utah;
 3. owning, leasing, or controlling property (real or personal) or assets in Utah;
 4. maintaining and hiring employees in Utah;
 5. advertising or soliciting business in Utah;
 6. generating sales through revenue generated from in-state customers;
 7. conducting activities that are sporadic or transitory as compared to continuous and systematic.
- Hill, 482 P.2d at 334; Buddensick v. Stateline Hotel, Inc., 972 P.2d 928 (Utah Ct. App. 1998) aff'd, 982 P.2d 88 (Utah 1999). Fred Meyer's activities in the State of Utah fall within each of the factors listed above.

By owning and operating the several Fred Meyer stores in Salt Lake City, Granger, Holladay, Sandy, West Jordan and other stores located in Utah, Fred Meyer is subject to the general jurisdiction of Utah courts. Likewise, Food 4 Less is subject to the general jurisdiction of Utah courts for owning and operating several stores in Utah.

B. Fred Meyer and Food 4 Less are Subject to the Specific Jurisdiction of the Court

In addition to being subject to the general jurisdiction of the Court, Fred Meyer and Food 4 Less are subject to the specific jurisdiction of the Court. In Utah, a three-part inquiry is used to determine whether specific personal jurisdiction exists: (1) the defendant's acts or contacts must implicate Utah under the Utah long-arm statute; (2) a "nexus" must exist between the plaintiff's

claims and the defendant's acts or contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due process. Harnischfeger, 883 F. Supp. at 612-13. Utah courts frequently make a due process analysis first because any set of circumstances that satisfies due process will also satisfy the long-arm statute. SII Mega-Diamond, 969 P.2d at 433.

Determining whether the court's exercise of personal jurisdiction violates the Due Process Clause is a two-step inquiry: (1) whether the Defendant has minimum contacts with Utah that he should reasonably anticipate being haled into court in Utah; and (2) whether the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice. Omi Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1091-92 (10th Cir. 1998).

1. Fred Meyer and Food 4 Less Should Reasonably Anticipate Being Haled into Utah Courts

As noted above, the contacts of Fred Meyers and Food 4 Less with Utah are pervasive. By registering to do business in Utah for the past nineteen years, distributing thousands of Fred Meyer products in the State to Utah residents and generating revenue from the sale of such products, owning substantial commercial real estate in Utah, and advertising to Utah residents, Fred Meyer has purposefully directed its activities at Utah residents and therefore Fred Meyer should reasonably anticipate being subject to the jurisdiction of Utah courts. Minimum contacts are sufficient if the defendant "purposefully avails itself of the privilege of conducting activities in the forum state." Far West, 46 F.3d at 1074.

2. Exercising Jurisdiction Will Not Offend Traditional Notions of Fair Play

Both Fred Meyer and Food 4 Less have decided to conduct business in the State of Utah by advertising, distributing and selling their products to Utah residents. Both parties receive revenue from selling products to Utah residents. Subjecting Fred Meyer and Food 4 Less to the jurisdiction of the Court would not offend fair play or substantial justice.

3. There is a Nexus Between the Parties' Activities and Plaintiff's Claims

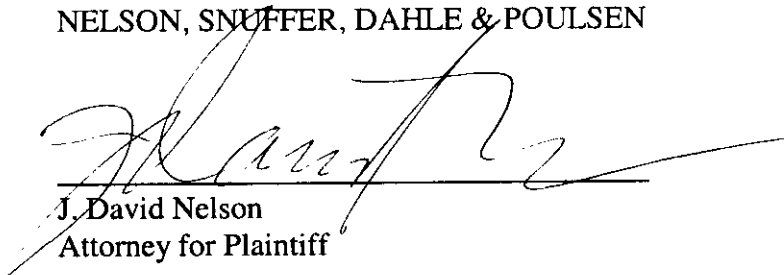
The infringing self scan units are being used by the parties in the grocery business. The parties are using the self scanning units in their stores to sell products. Plaintiff's patent infringement claim is directly related to the activities being conducted by the parties.

IV. Conclusion

For the reasons stated above, Fred Meyer and Food 4 Less are subject to the general and specific jurisdiction of the the Court. Plaintiff requests that the Motion to Amend Complaint be granted, that Plaintiff be granted leave to amend its Complaint and that the Third Complaint of the Plaintiff submitted herewith be entered.

DATED this 2 day of Jul, 2003.

NELSON, SNUFFER, DAHLE & POULSEN


J. David Nelson
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the office of Nelson, Snuffer, Dahle & Poulsen, P.C. and that I caused to be placed either in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF THE MOTION FOR LEAVE TO AMEND COMPLAINT** to the following:


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DATED this 2 day of June, 2003.



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